FILED
NOV 7 1951

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

NO. 416

STATE OF TEXAS,

Petitioner

vs.

GROUP OF INSTITUTIONAL INVESTORS HOLDING FIRST AND REFUNDING MORTGAGE 5% BONDS OF MISSOURI PACIFIC RAILROAD COMPANY, ET AL.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

PRICE DANIEL
Attorney General of Texas

C. K. RICHARDS
Assistant Attorney General
Counsel for Petitioner

INDEX

SUBJECT INDEX

	Pages
Petition for writ of certiorari:	
Summary statement of matter involved	1-6
Statement as to jurisdiction	6-7
Questions of Federal law which have not been but which should be settled by this Court	7-8
The questions presented	8-9
Reasons relied on for allowance of the writ	9-13
Prayer	13-14
Brief in support of petition for certiorari:	
Opinion of Court below	15
Preliminary statement	15
Specification of errors	15-16
Summary of argument	16-17
Argument	17
(1) The power to exercise the right of eminent domain to secure railroad rights-of-way over the public lands and highways of a sovereign State in violation of the Constitution and laws thereof cannot be granted to a foreign railroad corporation as a federally delegated power under the provisions of Section 77 of the Bankruptcy Act	17-21
(2) Where easements for railroad rights-of-way over the public lands and highways of a sovereign State, granted to domestic railroad companies under the Constitution and laws of that State, revert to the sovereignty upon the breach of a condition subsequent, neither the Interstate Commerce Commission nor the District Court in proceedings for reorganization of such railroads under the provisions of Section 77 of the Bankruptcy Act can authorize the convéyance of the legal title to or the use of such easements for rights-of-way to the reorganized foreign railroad corporation	21-26
Conclusion	26-27
Appendix	28-31

TABLE OF CASES CITED

REPORTS CITED

	Pages
Amaya v. Stanolind Oil & Gas Co., 62 F. Supp. 181, aff'd. 158 F. 2d 554, cert. den. 331 U.S. 308	23
Brightwell v. I. & G. N. R. Co., 121 Tex. 338, 49 S.W. 2d 437	25
Calcasieu Lumber Co. v. Harris, 77 Tex. 18, 13 S.W. 453	25
California v. Central Pacific R. R. Co., 127 U.S. 1	9, 10, 18
Calloway v. Benton, 336 U.S. 132	6, 9, 18
Cherokee Nation v. Kansas R. R. Co., 135 U.S. 641	18
Coffee v. Grover, 123 U.S. 1	23
East Line & Red River Ry. Co. v. Texas, 75 Tex. 434, 12 S.W. 690	25
Evansville & Henderson Traction Co. v. Henderson Bridge Co., 141 Fed. 51	18
Fort Worth & D. C. Ry. Co. v. Ammons, 215 S.W. 2d 407	19
In Missouri Pacific Railroad Company Unification, 166 I.C.C. 154	3
In Missouri Pacific Railroad Company Unification, 175 I.C.C. 26	3
In Re Missouri Pacific Railroad Company, 39 F. Supp. 436	3
In Re Missouri Pacific Railroad Company, 50 F. Supp. 936	3
In Re Missouri Pacific Railroad Company, 64 F. Supp. 64	3, 4
In Re Missouri Pacific Railroad Company, 93 F. Supp. 832	3
International-Great Northern Ry. Co. v. Anderson County, 174 S.W. 305, aff. 206 U.S. 424	3
Interstate Com. Comm. v. Louisville & Nashville R. Co., 227 U.S. 88	26
Kenedy Pasture Co. v. State of Texas, 111 Tex. 200, 231 S.W. 683	23

	Pages
Kynerd v. Hulen, 5 F. 2d 160, 5 Cir., cert. den., 269 U.S. 560	25
Missouri Pacific Railroad Co. Reorganization, 239 I.C.C. 7	3
Missouri Pacific Railroad Co. Reorganization, 257 I.C.C. 479	4
Missouri Pacific Railroad Co. Reorganization, 257 I.C.C. 745	4
Railway Express Co. v. Virginia, 282 U.S. 440	5
Right-of-Way Oil Co. v. Gladys City O. G. & M. C., 106 Tex. 94, 157 S.W. 737	25
Schwabacher v. United States, 334 U.S. 182	13
Seaboard Airline Ry. Co. v. Daniel, 333 U.S. 118	10, 11, 17
State v. Jadwin, 85 S.W. 490	23
Stearns v. Minnesota, 179 U.S. 223	23
St. Louis & S. F. R. Co. v. Foltz, 52 Fed. 627	18
Texas Central Railroad Co. v. Bowman, 97 Tex. 417, 79 S.W. 295	24
Texas & New Orleans RR Co. v. Schoenfeld, 136 Tex. 173, 146 S.W. 2d 724	19
Texas & Pacific RR Co. v. State, 142 Tex. 482, 78 S.W. 2d 580, affirming 52 S.W. 2d 957, cert. den. 296 U.S. 581	12, 24
United States v. Texas, 339 U.S. 707	23
Western Union Tel. Co. v. Penn. RR Co. 195 U.S. 540	18

STATUTES CITED

Constitution of the United States, Art. I, Sec. 8, Clause 3	10
Constitution of the United States, Art. VI	8, 12
Constitution of the United States, Amendment V	8, 12
Constitution of the United States, Amendment X	8, 12
Constitution of Texas, Art. X, Sec. 1	22
Constitution of Texas, Art. X, Sec. 2	22
Constitution of Texas, Art. X, Sec. 6	22, 25
U.S.C.A., Title 11, Sec. 47(c)	6
U.S.C.A., Title 11, Sec. 205	6, 9

Pages

U.S.C.A., Title 28, Sec. 1254 (1) 6
U.S.C.A., Title 49, Sec. 5 ..... 6, 9, 11
Revised Civil Statutes of Texas (Vernon's Civil Statutes (1948 Ed.) Vol. 1)
Article 1529 ..... 11, 25
Article 1538 ..... 11, 25
Article 6260 ..... 22, 25
Article 6287 25
Article 6316 20
Article 6316 (a) 20
Article 6317 22
Article 6318 20
Article 6320 ..... 20, 22
Article 6331 ..... 20, 22
Article 6336 20
Article 6339 ..... 12, 22, 25
Article 6340 22
9 U. S. Statutes at Large, 108 23
Acts 1st Tex. Leg., 1846, 155 23
Gammel's Laws of Texas, 1200 ..... 12, 23
8 Opinions of Attorney General of United States, 333 .. 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

NO. ———

STATE OF TEXAS,
Petitioner

vs.

GROUP OF INSTITUTIONAL INVESTORS HOLDING FIRST AND REFUNDING MORTGAGE 5% BONDS OF MISSOURI PACIFIC RAILROAD COMPANY, ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable Supreme Court of the United States and the Honorable Chief Justice and Associate Justices of Said Court:

The Petitioner, the State of Texas, respectfully shows to this Honorable Court:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This is an appeal by the State of Texas from Order No. 3571 of the United States District Court for the Eastern District of Missouri, entered October 3, 1950, in Cause No. 6935, In the Matter of Missouri Pacific

Railroad Company, Debtor, approving that part of the Plan of Reorganization of the principal debtor which provides that the properties of the International-Great Northern Railroad Company and 13 other subsidiary railroad company debtors, all chartered under the laws of the State of Texas, shall be merged or consolidated by transfer of the assets and properties of all such companies to a new or reorganized company, not incorporated under the laws of the State of Texas, which transfer may be effected by a merger, consolidation, transfer of assets, and/or any other means approved by the Reorganization Managers. (DR 28692-28693.)[1]

This proceeding was originally instituted by the principal debtor on March 31, 1933. Thereafter, the 14 Texas subsidiary railroad company debtors filed similar petitions therein. The system Plan of Reorganization, as approved, was submitted by the Interstate Commerce Commission on August 2, 1949 in its 4th Supplemental Report, and, after further hearing, in its 5th Supplemental Report and order of December 29, 1949. (DR 28459-28760.) The plan contemplates the reorganization of these companies as a single new system company with a provision for the separate reorganization of the International-Great Northern Railroad Company if that should be necessary. The opinion of the District Court upon the ap-

---

[1]Abbreviations referring to Record are: DR refers to that part of Vol. 52 of the District Court Record, Cause No. 6935, containing the 4th and 5th Supplemental Reports and 5th Supplemental Order of the Interstate Commerce Commission in Finance Docket No. 9918; TR refers to the printed record in Appeal No. 14,256 in the Court of Appeals; R refers to the printed record in Appeals Nos. 14,264-14,274 in the Court of Appeals; and CR refers to the record of proceedings in the Court of Appeals.

proved plan, which is reported in 93 F. Supp. 832, referred to the Court's previous opinions concerning earlier plans of reorganization of the same railroads reported in 39 F. Supp. 436, in 50 F. Supp. 936, and in 64 F. Supp. 64, which opinions set forth the relations of the Missouri Pacific Railroad Company to its subsidiaries, the course of the reorganization proceedings, and the questions, contentions, and rulings.

In approving the first plan of reorganization which was submitted to the District Court in 1940, and basing its findings in part on its previous findings in *Missouri Pacific Railroad Company Unification*, 166 I.C.C. 154 (1930) and 175 I.C.C. 26 (1931), the Interstate Commerce Commission held that there should be an entire merger and consolidation of all system properties, including the International-Great Northern Railroad Company and the 13 other Texas subsidiary railroad companies. (*Missouri Pacific Railroad Co. Reorganization*, 239 I.C.C. 7, 82-87.)

In approving the plan on June 20, 1941, the District Court found that the plan was defective insofar as it required consolidation and merger of the properties of *all* of the Texas debtor companies in the absence of some modification of the decree in the suit styled *I. & G. N. Railway Company v. Anderson County, et al.*, (Tex. Civ. App. 1914), 174 S.W. 325, affirmed 206 U.S. 424. (39 F. Supp. 436, 448, 449.) The plan, as modified and approved by the Court, was appealed to the Court of Appeals for the Eighth Circuit and by it remanded on May 8, 1943 to the District Court and by the District Court referred back to the Interstate Commerce Commission for further proceedings. (50 F. Supp. 936, 937, 943.)

After receiving the plan of reorganization back from the Court, the Interstate Commerce Commission held hearings and in its order of October 9, 1944 (*Missouri Pacific Railroad Co. Reorganization*, 257 I.C.C. 479 and 257 I.C.C. 745) ultimately approved, with certain alterations, a plan known as the "compromise" plan, which was still substantially the plan as to consolidation or merger of the subsidiary debtors previously approved by the District Court in 1941.

After having been approved by the District Court, (*In re Missouri Pacific Railroad*, 64 F. Supp. 64, 68), the "compromise" plan was returned to the Interstate Commerce Commission because the Commission filed with the Circuit Court of Appeals a memorandum indicating that the proposed plan had become obsolete because of substantial debt retirements and large accumulations of cash which had resulted from war earnings. (TR 88.)

On October 28, 1948, the Interstate Commerce Commission issued the 4th Supplemental Report in Finance Docket No. 9918, proposed by Ralph H. Jewell, Examiner, which recommended that the protest of the State of Texas be rejected except as to its objection to the consolidation of the properties of the International-Great Northern Railroad Company with the reorganized company, the recommendation being that in this respect there be no modification of the provisions of the previous plan. (TR 8-11.) On December 6, 1948, the State of Texas filed its exceptions to the proposed report, specifically excepting to the dissolution and merger or consolidation of the subsidiary railroad company debtors forming part of the Missouri Pacific System which were incorporated under the laws of the State of Texas and operating in Texas in intrastate

commerce, contending (1) that under the Constitution and laws of the State of Texas no foreign railroad carrier can receive a permit from the State to operate within the State in intrastate commerce; (2) that the legal principles in *Seaboard Airline Railway Receivership* (261 I.C.C., 689, 718) are not applicable in that the provisions of the Constitution and laws of South Carolina are not the same as the provisions of the Constitution and laws of Texas; (3) that the decision in the South Carolina case is not controlling in the present proceedings because such proceedings were under Section 5 of the Interstate Commerce Act, as amended, and not under Section 77 of the Bankruptcy Act; (4) that the proposed consolidation or merger is an attempt to set aside or overrule the principles of law enunciated by the United States Supreme Court in *Railway Express Company v. Virginia*, 282 U.S. 440; and (5) that the proposed merger constitutes a violation of the Fifth and Tenth Amendments to the Constitution of the United States insofar as it attempts to authorize the use of the public highways of the State of Texas by the reorganized company as a foreign corporation or to grant to the reorganized company the title to and the right to use the rights-of-way acquired by condemnation proceedings by each of the 14 Texas subsidiary railroad debtors under the laws of the State of Texas. (TR 11-15.)

On August 2, 1949, the Interstate Commerce Commission issued its 4th Supplemental Report and Order in Finance Docket No. 9918, in which it specifically overruled the contentions of the State of Texas, Nos. 1 to 4, inclusive, *supra;* did not discuss or specifically rule upon contention No. 5, *supra*, and reaffirmed without modification the finding concerning separate in-

corporation of the International-Great Northern Railroad Company contained in its previous plan. (DR 28613-28618.) Commissioner Splawn filed a separate opinion concurring in part with the majority opinion but dissenting vigorously as to the findings of the majority on the contentions of the State of Texas. (DR 28630-28633.)

On December 29, 1949, the Interstate Commerce Commission entered its 5th Supplemental Report and Order in Finance Docket No. 9918, and again overruled the contentions of the State of Texas (DR 28647-28653), Commissioner Splawn dissenting (DR 28685).

On March 27, 1950, the District Court proceeded to hear oral argument on the objections of the State of Texas (TR 65-85), and on July 29, 1950, rendered its opinion overruling each and every objection of the State of Texas (TR 111, 116).

On August 14, 1950, the United States Court of Appeals for the Eighth Circuit affirmed the judgment of the trial court. (CR 14-36.)

II.

STATEMENT AS TO JURISDICTION

(1) The date of the judgment of the Court of Appeals, Eighth Circuit, sought to be reviewed is August 14, 1948 (CR 14), and the opinion of the Court (CR 14-36) is reported in 191 F. 2d 265.

(2) The Court of Appeals has decided an important question of general law in conflict with the decision of this Court in *Calloway v. Benton*, 336 U.S. 132, in the construction of the provisions of Section 77 of the Bankruptcy Act (11 U.S.C.A., Sec. 205), and Section

5 of the Interstate Commerce Act (49 U.S.C.A., Sec. 5) relating to the granting of Federal powers to a reorganized railroad corporation operating in interstate commerce.

(3) The jurisdiction of this Court is invoked under the provisions of Section 24(c) of the Bankruptcy Act (11 U.S.C.A., Sec. 47(c)) and Section 1254(1) of the Judicial Code, Acts of June 25, 1948 (28 U.S.C.A., Sec. 1254(1)).

III.

QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT

(1) The Court of Appeals decided that in proceedings under Section 77 of the Bankruptcy Act the Interstate Commerce Commission could grant the right to exercise the power of eminent domain to a reorganized foreign railroad corporation engaged in interstate commerce in a State where the exercise of such power by a foreign railroad company was prohibited by its Constitution and laws. This holding by the Court of Appeals is contrary to the express provisions of Section 77 of the Bankruptcy Act (11 U.S.C.A., Sec. 205), and is an important question of Federal law which has not been but should be decided by this Court.

(2) The Court of Appeals decided that the transfer to the reorganized foreign railroad company of the title to and the use of the easements for rights-of-way over public lands and highways belonging to and the property of the State of Texas, acquired by the Texas railroad company subsidiary debtors under the Constitution and laws of Texas, would constitute a valid and legal transfer of such title under the provisions

of the Plan of Reorganization. This holding by the Court of Appeals is directly contrary to and in violation of the Treaty of Annexation of the State of Texas with the United States and therefore violates Article VI of, as well as the Fifth and Tenth Amendments to, the Constitution of the United States in that it attempts to deprive a sovereign State of the title to its public lands, reserved to it by treaty, without due process of law. This is an important question of Federal law which has not been and should be decided by this Court.

IV.

THE QUESTIONS PRESENTED

The following questions are presented for decision:

(1) Whether Section 77(f) of the Bankrutpcy Act delegates to the Interstate Commerce Commission or the District Court, in railroad reorganization proceedings, the power to vest in a foreign railroad corporation the right of eminent domain over lands, public or private, situated in a State where, under the Constitution and laws thereof, such foreign railroad corporation is prohibited from exercising the right of eminent domain;

(2) Whether a plan of reorganization under Section 77(b)(5) of the Bankruptcy Act which authorizes transfer of the title to easements for rights-of-way over public lands held by subsidiary railroad company debtors, which revert to the sovereignty upon the breach of a condition subsequent, can convey the legal title to and the right to use such rights-of-way to a reorganized foreign railroad company which is prohibited by the Constitution and laws of a State from

obtaining a permit to engage in intrastate business therein.

V.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

(1) In holding that the orders of the Interstate Commerce Commission which have been approved by the Court simply constitute an exercise of Federal power conferred upon the Commission by Federal statute, the Court of Appeals has decided a question of Federal law in a way that is untenable and is in direct conflict with the decision of this Court in *Calloway v. Benton*, 336 U.S. 132, in the construction of the provisions of Section 77 of the Bankruptcy Act (11 U.S.C.A., Sec. 205), and Section 5 of the Interstate Commerce Act (49 U.S.C.A., Sec. 5), relating to the granting of Federal powers to a reorganized railroad corporation operating in interstate commerce. This holding by the Court of Appeals is also in direct conflict with the decision of this Court in *California v. Central Pacific Railroad Company*, 127 U.S. 1, and other decisions of the Supreme Court of the United States.

In *Calloway v. Benton*, 336 U.S. 132, 140 (1949), this Court held, in part:

> "The Commission preferred, instead, to carry out the consolidation under the authority of §77 (b)(5) of the Bankruptcy Act, which provides that the plan of reorganization may include 'the merger or consolidation of the debtor with another corporation, or corporations.' *That power flows from a different source than the power over consolidations under the Interstate Commerce Act. . . .*"[2]

[2]Italics throughout are supplied unless otherwise indicated.

Inasmuch as the proceedings herein are under Section 77 of the Bankruptcy Act (TR 86), the powers of the Interstate Commerce Commission and the District Court to order mergers or consolidations are derived solely from that part of Section 8, Article 1 of the Constitution of the United States which gives the Congress power to establish uniform laws on the subject of bankruptcy throughout the United States, and *not* the provision giving Congress the power to regulate commerce among the several States.

In *Seaboard Airline Co. v. Daniel*, 333 U.S. 118, 126 (1947), this Court held that the power of eminent domain is granted to the new company as a federally conferred power under Section 5(11) of the Interstate Commerce Act, stating:

> ". . . These federally conferred powers can be exercised in the same manner as though they had been granted to a federally created corporation. See *California v. Central Pacific R. Co.*, 127 U.S. 1, 38, 40-45. Here, just as a federally created railroad corporation could for federal purposes operate in South Carolina, so can this Virginia corporation exercise its federally granted power to operate in this State."

In *California v. Central Pacific R. Co.*, 127 U.S. 1, 40 (1887), this Court held that under the power to regulate commerce among the several States the Congress could delegate the power to exercise the right of eminent domain to a private corporation, adding that *"the right of eminent domain can only be exercised by virtue of a legislative grant."*

The Court of Appeals decided that the Federal power conferred upon the Interstate Commerce Commission and the District Court under Section 77(b)(5)

and (f) was sufficiently broad to vest the power of eminent domain in a foreign railroad corporation which cannot exercise such power in the State of Texas, since it is prohibited by the Constitution and laws thereof from obtaining a permit to engage in intrastate business therein.[3] The Court of Appeals seems to have relied upon the ruling by this Court in *Seaboard Airline Co. v. Daniel, supra,* which involved a grant of such power under Section 5(11) of the Interstate Commerce Act, as authority to delegate federally controlled powers to the reorganized railroad corporation under Section 77 of the Bankruptcy Act (CR 22-25).

In the absence of congressional legislation delegating such federally controlled power to the new company under the plan of reorganization authorized by the Bankruptcy Act with the approval of the Interstate Commerce Commission and the District Court, it is clear that the power of the District Court under the provisions of Section 77(f) of the Bankruptcy Act does not have such extra-judicial or extra-territorial scope as to authorize the new company to exercise the power of eminent domain in Texas where the State of Texas has granted no such right or authority.

(2) In holding that the plan of reorganization provides adequate means for its execution by authorizing the transfer of the title to easements for rights-of-way over public lands held by the Texas subsidiary railroad company debtors, the Court of Appeals has decided a question of both Federal and State law in a way that is untenable and is contrary to and in violation of the Treaty of Annexation of the State of Texas,

---

[3]Articles 1529, 1538, Vernon's Texas Statutes (1948 Edition). (App. 31.)

with the United States (2 Gammel's Laws of Texas, 1200, 1225, 1228), whereby Texas reserved all of its public lands, and therefore violates Article VI of the Constitution of the United States, as well as the Fifth and Tenth Amendments to the Constitution of the United States, in that such holding attempts to deprive a sovereign State of the title to its public lands reserved to it by treaty without due process of law.

In the case of *Texas & Pacific Ry. Co. v. State*, 142 Tex. 482, 78 S.W. 2d 580 (1935), certiorari denied, 296 U.S. 581 (1935), it was held that railroad companies acquiring rights-of-way over the public lands of the State of Texas acquired only easements as provided in Article 6339, Texas Civil Statutes (App. 30). Under the provisions of Article 6339 such easements for rights-of-way remain the property of a railroad corporation chartered under the laws of Texas only during the time it maintains that status by complying with the Constitution and laws of the State of Texas. Although Article 6339 provides that such rights-of-way shall not be lost by forfeiture or expiration of the charter, they only remain subject to an extension of the charter or the grant of a new charter over the same way without a new condemnation. Manifestly, the transfer of the title to such rights-of-way to the reorganized foreign corporation is not an extension of the charter of the Texas subsidiary railroad company debtor nor is the acquisition thereof by the reorganized foreign railroad corporation comprehended within the "grant of a new charter over the same way without a new condemnation," since the reorganized railroad corporation is not organized under the laws of Texas and cannot receive a permit to engage in intrastate commerce in Texas.

Conceding that under the provisions of Section 77 (f) of the Bankruptcy Act the Plan of Reorganization shall be put into effect notwithstanding the laws of the State of Texas to the contrary, nevertheless the legality of the title to and the right to use the rights-of-way acquired by Texas railroad corporations over public lands or highways of the State is a question of law for interpretation and decision by the highest Court of the State of Texas, and neither the Interstate Commerce Commission or the District Court could be given plenary jurisdiction to interpret and apply such State law. *Schwabacher v. United States*, 334 U.S. 182, 190, 198 (1948).

Although this specific question of law was twice urged before the Interstate Commerce Commission (TR 14-15, 19), again presented to the District Court (TR 83-85), and to the Court of Appeals (TR 131-132), nevertheless the Interstate Commerce Commission, the District Court, and the Court of Appeals each failed to rule specifically upon such point of error, thus presenting a substantial and important question, involving both Federal and State law, which should be decided by this Court if the Plan of Reorganization is to provide effective means for its execution.

WHEREFORE, Petitioner respectfully prays that a writ of certiorari be issued under the Seal of this Honorable Court and directed to the Court of Appeals for the Eighth Circuit, directing that Court to certify and send to this Court for its review and determination, on the day to be named therein, a transcript of the record of the proceedings herein; that the judgment of said Court of Appeals be reversed insofar as it provides for the consolidation or merger of the Texas

railroad subsidiary debtors with the reorganized company, and that your Petitioner have such other and further relief in the premises as this Honorable Court may deem mete and just.

Respectfully submitted
STATE OF TEXAS, *Petitioner*

By PRICE DANIEL
Attorney General of Texas

By C. K. RICHARDS
Assistant Attorney General

Address:
State Capitol
Austin, Texas

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

NO. ———

STATE OF TEXAS,
Petitioner

vs.

GROUP OF INSTITUTIONAL INVESTORS HOLDING FIRST AND REFUNDING MORTGAGE 5% BONDS OF MISSOURI PACIFIC RAILROAD COMPANY, ET AL.,
Respondents

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I.

Opinion of Court Below

The opinion of the Court of Appeals (CR 14-36) is reported in 191 F. 2d 265.

II.

Preliminary Statement

The Summary Statement of the Matter Involved, Statement as to Jurisdiction, and Statement of Questions Presented appear in the foregoing Petition for Certiorari (*ante*, pages 1 to 14), and are adopted without repetition.

III.

Specification of Errors

(1) The Court of Appeals erred in holding that the provisions of Section 77 of the Bankruptcy Act dele-

gated to the Interstate Commerce Commission and the District Court authority to vest the power of eminent domain in a foreign railroad corporation engaged in interstate commerce in a State where, under its Constitution and laws, the exercise of such power was prohibited.

(2) The Court of Appeals erred in holding that the Plan of Reorganization approved by the Interstate Commerce Commission and the District Court provided adequate means for its execution insofar as it authorized the transfer of the title to and the use of easements for rights-of-way over public lands and highways acquired by subsidiary railroad company debtors chartered under the laws of the State of Texas, to the reorganized foreign railroad company which is prohibited by the Constitution and laws of Texas from obtaining a permit to engage in intrastate business therein, since upon such transfer the title to and the right to use such easements would revert to the sovereign upon the breach of a condition subsequent.

IV.

SUMMARY OF ARGUMENT

(1) The power to exercise the right of eminent domain to secure railroad rights-of-way over the public lands and highways of a sovereign State in violation of the Constitution and laws thereof cannot be granted to a foreign railroad corporation as a federally delegated power under the provisions of Section 77 of the Bankruptcy Act.

(2) Where easements for railroad rights-of-way over the public lands and highways of a sovereign State, granted to domestic railroad companies under

the Constitution and laws of that State, revert to the sovereignty upon the breach of a condition subsequent, neither the Interstate Commerce Commission nor the District Court in proceedings for reorganization of such railroads under the provisions of Section 77 of the Bankruptcy Act can authorize the conveyance of the legal title to or the use of such easements for rights-of-way to the reorganized foreign railroad corporation.

V.

ARGUMENT

(1) The power to exercise the right of eminent domain to secure railroad rights-of-way over the public lands and highways of a sovereign State in violation of the Constitution and laws thereof cannot be granted to a foreign railroad corporation as a federally delegated power under the provisions of Section 77 of the Bankruptcy Act.

The Court of Appeals, in affirming the power of the Interstate Commerce Commission to delegate the power of eminent domain to the reorganized company over the lands, public and private, in the State of Texas, relies upon the decision of this Court in *Seaboard Airline R. Co. v. Daniel*, 333 U.S. 118 (1948), which holds that the federally conferred powers granted by Section 5(11) of the Interstate Commerce Act may be exercised by the reorganized corporation in the same manner as though they had been granted to a federally created corporation. Petitioner contends that Section 77 of the Bankruptcy Act does not confer the Federal power of eminent domain upon the reorganized corporation, either by specific grant or by implication.

Section 77 of the Bankruptcy Act authorizes the transfer of any interest in or control of all or any part of the property of the debtor to another corporation by merger or consolidation (Sec. 77(b)(5), the laws of any State to the contrary notwithstanding (Sec. 77(f)). This is the sole authority granted to the Interstate Commerce Commission and the District Court under the powers delegated by the Congress in matters of bankruptcy. Such delegated powers are wholly distinct from the powers delegated by the Congress to regulate commerce. *Calloway v. Benton*, 336 U.S. 132, 140 (1949).

The power to exercise eminent domain in the regulation of commerce in the several States is inherent in the United States, but such power may be specifically delegated by the Congress to a private corporation. *Cherokee Nation v. Kansas R.R. Co.*, 135 U.S. 641, 656 (1893); *California v. Central Pacific R.R. Co.*, 127 U.S. 1, 39, 40 (1887). In the absence of such specific statutory delegation a foreign railroad corporation is without power to exercise the right of eminent domain in a State wherein the exercise of such power is prohibited or where such power has been withheld. *Evansville & Henderson Traction Co. v. Henderson Bridge Co.*, 141 Fed. 51 (C.C.A. 6th Cir. 1905); *St. Louis & S. F. R. Co. v. Foltz*, 52 Fed. 627 (C.C.W.D. Ark., 1892).

In *Western Union Telegraph Co. v. Penn. R.R. Co.*, 195 U.S. 540, 569 (1904), this Court held:

> "But in the act of July, 1866, *there is not a word which provides for condemnation or compensation.* The rule that when a right is given all the means of exercising it are given does not, as we have seen, apply to the extent contended for

> by the Telegraph Company. The exercise of the power of eminent domain is against common right. It subverts the usual attributes of the ownership of property. It must, therefore, be given in express terms or by necessary implication, and this was the reasoning in the *Pensacola* case and applied directly to the act of 1866. We may repeat the language of the court: 'If private property is required it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized.' "

It has long been settled law in Texas that a railroad company must be legally incorporated *in Texas* before it may exercise power of eminent domain delegated to it by the sovereign. When such railroad company ceases to comply with the Constitution and laws of Texas by failing to maintain its corporate existence therein, it may not avail itself of the power of eminent domain, since such legislative delegation of authority is granted only to railroad corporations which are chartered by and in compliance with the Constitution and laws of Texas. *Texas & New Orleans R.R. Co. v. Schoenfeld,* 136 Tex. 173, 176, 146 S.W. 2d 724 (1949), and authorities therein cited; *Fort Worth & D. C. Ry. Co. v. Ammons,* 215 S.W. 2d 407, 410 (Tex. Civ. App. 1948, error ref.).

The Court of Appeals held that the plan of reorganization which authorized the merger or consolidation of the 14 Texas debtors with the new company would result in economy of operation, would be in the public interest, and an advantage to all debtors, and stated that such findings were supported by material and substantial evidence. (CR 22-23.) Conceding, *arguendo* only, that such factual findings were

based upon substantial evidence, Petitioner contends that the reorganized corporation, not being incorporated in the State of Texas and therefore being deprived of the right of eminent domain, could not construct and operate spur or industrial tracks under the provisions of Article 6316a, Texas Civil Statutes (App. 29) or enter upon any lands, either publicly or privately owned, in order to make a survey for the purpose of constructing such tracks under the provisions of Article 6318 (App. 29) or to construct its road across, along or upon any stream of water, watercourse, street or highway, under the provisions of Articles 6320 and 6331 (App. 29, 30). Being without the power of eminent domain, when the new company desired to avail itself of any of the rights just enumerated, it would have to enter into contracts with the State of Texas or its various political subdivisions, or with private persons, to accomplish its needs. It could not avail itself of the provisions of Article 6336 (App. 30) which provide that whenever a railroad corporation shall be unable to agree with an owner for the purchase of real estate or material thereon required for the transaction of its business, such corporation may acquire such property by condemnation.

This Court may take judicial notice that condemnation proceedings are resorted to by municipal or private corporations vested with the power of eminent domain, only when they have been unable to enter into "arm's length" contracts with the seller because the "asking" price of the land or material is greatly in excess of the actual market value thereof. Bearing this in mind, Petitioner contends that to so deprive the new company of the advantages heretofore enjoyed by its 14 Texas subsidiary companies, who have been and

still are complying with the Constitution and laws of the State of Texas, would not be in accord with the national transportation policy or be in the public interest and, in addition, would constitute a burden upon the new company in the management and operation of an efficient transportation system in the national interest.

Being deprived of the advantages which it presently enjoys under its present system operation as the "Missouri Pacific Lines," the new company would be at a distinct disadvantage to continue such operation in competition with other major railroad systems now operating in the State of Texas in compliance with its Constitution and laws. Neither the Interstate Commerce Commission, the District Court, nor the Court of Appeals specifically passed upon this contention of the State of Texas, but, each erroneously assumed that the question had been finally disposed of by the ruling of this Court in *Seaboard Airline R. Co. v. Daniel, supra.*

Petitioner urges that being deprived of the power of eminent domain in the State of Texas, the merger or consolidation of the Texas subsidiary debtors with the reorganized company would not result in economy of operations or be in the public interest or of advantage to all the debtors, as a matter of law, and therefore the Plan of Reorganization is defective insofar as it provides for the merger or consolidation of the Texas subsidiary debtors with the new company.

(2) Where easements for railroad rights-of-way over the public lands and highways of a sovereign State, granted to domestic railroad companies under the Constitution and laws of that State, revert to the sovereignty upon the breach of a condition subse-

quent, neither the Interstate Commerce Commission nor the District Court in proceedings for reorganization of such railroads under the provisions of Section 77 of the Bankruptcy Act can authorize the conveyance of the legal title to or the use of such easements for rights-of-way to the reorganized foreign railroad corporation.

Railroads in Texas are declared to be public highways by the provisions of Article X, Section 2 of the Constitution of Texas. (App. 28.) The 14 railroad company subsidiary debtors, chartered under the laws of the State of Texas to operate their lines of railway in intrastate commerce, secured the easements for rights-of-way over the public lands and highways of the State of Texas under the provisions of Articles 6317, 6320, 6331, 6339, and 6340, Texas Civil Statutes (App. 29, 30, 31).

In connection with the granting of the charters to the Texas railroad company debtors and the acquisition by such debtors of the easements for rights-of-way and other easements authorized by the Constitution and laws of the State of Texas, such authorizations or grants were and are limited to railroad companies incorporated under the laws of the State of Texas which own, operate, and maintain their lines of railway in compliance with the Constitution and laws of Texas and not in violation thereof. (Art. X, Secs. 1, 3, 6, Texas Constitution; Art. 6260, Texas Civil Statutes) (App. 28).

When the Republic of Texas was annexed to the United States by treaty under the joint resolutions of the Congress of the United States, approved June 23,

1845, the State of Texas retained all of the vacant and unappropriated lands lying within its limits.[4]

By a Joint Resolution passed April 29, 1846, the First Legislature of the State of Texas declared, "That the exclusive right to the jurisdiction over the soil included in the limits of the late Republic of Texas was acquired by the valor of the people thereof, and was by them vested in the government of said Republic; that such *exclusive right* is now vested in and belongs to the State. . . ." (Acts of the First Legislature, 1846, p. 155.)

Not only did Texas retain her public lands, but likewise the power of eminent domain, except where granted to the United States by State statute. In an opinion by the Attorney General of the United States it was held that the Federal Government had no power to condemn land in Texas for military purposes and that "The eminent domain of the Mexican Republic in Texas passed to the Republic and State of Texas and never vested in the United States". 8 Opinions of Attorney General of United States 333 (Opinion by Hon. Cale C. Cushing of Massachusetts).[5]

It is settled law in Texas that railroad companies acquiring rights-of-way over the public lands of the

[4]2 Gammel's Laws of Texas 1200; 9 U.S. Statutes at Large, 108; See *United States v. Texas*, 339 U.S. 707, 714 (1950); *Amaya v. Stanolind Oil & Gas Co.*, 62 F. Supp. 181 (1945), aff'd 158 F. 2d 554 (C.C.A. 5th 1946), cert. den. 331 U.S. 808 (1947), reh'g den. 331 U.S. 867 (1947); *State v. Jadwin*, 85 S.W. 490 (Tex. Civ. App. 1904, error ref.). Compare *Stearns v. Minnesota*, 179 U.S. 223 (1900).

[5]Since the United States owns no public lands in Texas, an attempted grant of public lands therein by the United States would be a nullity. *Coffee v. Grover*, 123 U.S. 1 (1887); *Kenedy Pasture Co. v. State of Texas*, 111 Tex. 200, 231 S.W. 683 (1921).

State of Texas acquire only easements which are not lost by forfeiture or expiration of the charter of the railroad corporation, but remain *subject* to an extension of the charter or the grant of a new charter over the same right of way without a new condemnation. In *Texas & Pacific Railway Co. v. State,* 52 S.W. 2d 957, 960 (Tex. Civ. App. 1932), aff'd, 124 Tex. 482, 78 S.W. 2d 580 (1935), cert. den. 296 U.S. 581 (1935), it was held:

> ". . . Without further discussion of the matter we think it is clear that, when appellant railroad company undertook the construction of its road over the public lands of the state in 1881, it did so subject to the laws of the state then in force relating thereto. The fact that it was chartered by the United States did not relieve it from such regulation so far as the state's public lands or police power were concerned. We conclude, therefore, that under the pleadings and the agreed statement of facts appellant does not have a fee-simple title to its right of way over the lands in question."

In *Texas Central Railroad Company v. Bowman,* 97 Tex. 417, 423, 79 S.W. 295 (1904), the Court held:

> "The right granted to any company is only the use of a narrow strip of land of which the fee is not acquired by the railroad company but remains in the State subject to its disposal; and the right of the railroad company is held subject to all conditions and limitations which by law attach to such property."

Petitioner contends that the easements for rights-of-way granted to the Texas railroad company debtors are permissive grants or franchises which inure to the benefit of the railroad companies only as long as they

maintain their status as Texas corporations in compliance with the Constitution and laws of the State of Texas. The right to use the easements over public lands and highways of the State, acquired by the Texas railroad companies, would be terminated by an attempted transfer of such easements to a foreign railroad corporation which is prohibited by the Constitution and laws of the State of Texas from engaging in intrastate commerce within the State of Texas.[6] Such rights-of-way are granted by the State over the public lands of Texas as a matter of public policy, without compensation, and are not evidenced by any muniments of title emanating from the State of Texas, except in rare instances where such Texas railroad companies were incorporated under special charters by special Acts of the Legislature. The easements for rights-of-way are not forfeited by the forfeiture or expiration of the charter of the railroad corporation, but remain *subject* to the extension of the charter or the grant of a new charter by the State of Texas over the same right-of-way. (Art. 6339, Texas Civil Statutes, App. 30)[7]

Since the title to and the disposition of the public lands of Texas have been vested in the sovereign State

---

[6]Art. X, Sec. 6, Constitution of Texas (App. 28); Arts. 1529, 1538, 6260, 6287, Texas Civil Statutes (App. 31, 28); *East Line & Red River Ry. Co. v. Texas*, 79 Tex. 434, 12 S.W. 690 (1889); *International & G. N. Ry. Co. v. Anderson County*, 174 S.W. 305 (Tex. Civ. App. 1915, error ref.), aff'd 206 U.S. 424.

[7]Railroad rights-of-way acquired by condemnation proceedings are easements only. *Calcasieu Lumber Company v. Harris*, 77 Tex. 18, 13 S.W. 453 (1890); *Brightwell v. I.G.N.R. Co.*, 121 Tex. 338, 49 S.W. 2d 437 (1932); *Right-of-Way Oil Co. v. Gladys City O. G. & M. Co.*, 106 Tex. 94, 157 S.W. 737 (1913); *Kymerd v. Hulen*, 5 F. 2d 160 (5th Cir. 1925), cert. den. 269 U.S. 560.

of Texas prior to and since it became one of the States of these United States, the Interstate Commerce Commission and the District Court are wholly without any authority, express or implied, under the provisions of Section 77 of the Bankruptcy Act, to authorize the transfer of the title to and the right to use the easements for rights-of-way acquired by the 14 Texas subsidiary debtors over the public lands belonging to and part of the State of Texas, to the reorganized foreign railroad corporation which is prohibited by the Constitution and laws of the State of Texas from engaging in any commerce other than interstate within the State of Texas. Insofar as the Plan of Reorganization attempts to authorize transfer of the rights-of-way over public lands of the State of Texas now held by the 14 Texas subsidiary railroad company debtors to the reorganized company, it violates Article VI of, and the Fifth and Tenth Amendments to, the Constitution of the United States and is manifestly arbitrary and void. *Interstate Commerce Commission v. Louisville & Nashville R.R. Co.*, 227 U.S. 88, 91, 92 (1912). Hence the Plan of Reorganization does not provide adequate means for its execution.

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing the decision of the Court of Appeals for the Eighth Circuit, which affirmed the judgment of the District Court confirming the Plan

of Reorganization of the Missouri Pacific Railroad Company, Debtor.

STATE OF TEXAS, *Petitioner*

By PRICE DANIEL
Attorney General of Texas

By C. K. RICHARDS
Assistant Attorney General

Counsel for Petitioner

APPENDIX

THE TEXAS CONSTITUTION AND STATUTES

Pertinent provisions of the Constitution and laws of the State of Texas are as follows:*

Article X, Constitution of Texas.

"Sec. 1. (in part) Any railroad corporation or association, organized under the law for the purpose, shall have the right to construct and operate a railroad between any points within this State, and to connect at the State line with railroads of other states. . . ." (Page LV)

"Sec. 2. (in part) Railroads heretofore constructed or which may hereafter be constructed in this state are hereby declared public highways, and railroad companies, common carriers. . . . (Page LV)

"Sec. 6. No railroad company organized under the laws of this State, shall consolidate by private or judicial sale or otherwise with any railroad company organized under the laws of any other State or of the United States." (Page LVI)

Applicable provisions of Title 112, Railroads, of the Revised Civil Statutes of Texas, 1925, are:

"Art. 6260. No corporation, except one chartered under the laws of Texas, shall be authorized or permitted to construct any railways within State." (Page 1774)

"Art. 6287. The public office of a railroad corporation shall be considered the domicile of such corporation." (Page 1777)

"Art. 6316. Any railroad corporation shall have the right to construct and operate a railroad

*All page references are to Vernon's Texas Statutes (1948 Edition), Vol. 1.

between any points within this State, and to connect at the State line with railroads of other States." (Page 1779)

"Art. 6316a. Every railroad company owning, leasing or operating a line of railroad in this State shall have authority and power to construct and operate spur or industrial tracks designed to reach or serve industries or industrial enterprises, such as mills, mines, rock quarries, rock deposits, gravel pits, gravel deposits, smelters, warehouses and other manufacturing or industrial enterprises, over which regular scheduled passenger or freight service will not be performed and for transportation over which only a switching charge, if any, will be made, together with all necessary sidetracks and subsidiary or accessory spur tracks, and shall have power and authority under the General Laws of this State relating to railroads to condemn property for rights of way for any and all such tracks hereby authorized." (Page 1779)

"Art. 6317. Every such corporation (railroad) shall have the right of way for its line of road through and over any lands belonging to this State, and to use any earth, timber, stone or other material upon any such land necessary to the construction and operation of its road through or over said land." (Page 1779) (Parenthetical insertion ours)

"Art. 6318. Every railroad corporation shall have the right to cause such examination and survey for its proposed railway to be made as may be necessary to the selection of the most advantageous route, and for such purpose may enter upon the lands or waters of any person or corporation, but subject to responsibility for all damages that may be occasioned thereby." (Page 1779)

"Art. 6320. Such corporation shall have the right to construct its road across, along, or upon

any stream of water, water course, street, highway, plank road, turnpike, or canal when the route of said railway shall intersect or touch; but such corporation shall restore the stream, water course, street, highway, plank road, turnpike, or canal thus intersected or touched, to its former state, or to such state as not to unnecessarily impair its usefulness, and shall keep such crossing in repair." (Page 1779)

"Art. 6331. In case of the construction of any railway along the highways, plank roads, turnpikes, or canals, such railroad corporation shall either first obtain the consent of the lawful authorities having control or jurisdiction of the same or condemn the same under the provisions of law." (Page 1780)

"Art. 6336. (in part) If any railroad corporation shall at any time be unable to agree with the owner for the purchase of any real estate, or material thereon, required for the purpose of its incorporation or the transaction of its business, for its depots, station buildings, machine and repair shops, for the construction of reservoirs for the water supply, or for the right of way, or for a new or additional right of way, for change, or relocation of road bed, to shorten the line, or any part thereof, or to reduce its grades, or any of them, or for double tracking its railroad or constructing and operating its tracks, which is hereby authorized and permitted, or for any other lawful purpose connected with or necessary to the building, operating or running its road, such corporation may acquire such property by condemnation thereof. . . ." (Page 1780)

"Art. 6339. The right of way secured by condemnation to any railway company in this State shall not be construed to include the fee simple estate in lands, either public or private, nor shall the same be lost by forfeiture or expiration of the

charter, but shall remain subject to an extension of the charter or the grant of a new charter over the same way without a new condemnation." (Page 1781)

"Art. 6340. The right of way is hereby reserved to any railroad company incorporated by the laws of this State, to the extent of one hundred feet on each side of said road, or roads that cross over or extend through any lands granted, or that may be granted to any railroad company by the Legislature, with the right to take from the lands so granted such stone, timber and earth as such road may need in the construction of its line of road." (Page 1781)

Applicable provisions of Title 32, Corporations, of the Revised Civil Statutes of Texas, 1925, are:

"Art. 1529. Any corporation for pecuniary profit, except as hereinafter provided, organized or created under the laws of any other State, or of any territory of the United States, or of any municipality of such State or territory, or of any foreign government, sovereignty or municipality, desiring to transact or solicit business in Texas or to establish a general or special office in this State, shall file with the Secretary of State a duly certified copy of its articles of incorporation; and thereupon such official shall issue to such corporation a permit to transact business in this State for a period of ten years from the date of so filing such articles of incorporation. If such corporation is created for more than one purpose, the permit may be limited to one or more purposes." (Page 543)

"Article 1538. (in part) The provisions of this chapter shall not apply to corporations created for the purpose of constructing, building, operating or maintaining any railway, . . ." (Page 544)